

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

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:  
JONATHAN R., et al., : Civil Action  
:  
Plaintiffs, : No. 3:19-cv-00710  
:  
v. :  
: Date: January 9, 2023  
JIM JUSTICE, et al., :  
:  
Defendants. :  
\_\_\_\_\_  
x

TRANSCRIPT OF TELEPHONIC CONFERENCE HELD  
BEFORE THE HONORABLE THOMAS E. JOHNSTON, CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
IN CHARLESTON, WEST VIRGINIA

APPEARANCES:

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Court Reporter: Ayme Cochran, RMR, CRR

Proceedings recorded by mechanical stenography;  
transcript produced by computer.

1                   PROCEEDINGS had before The Honorable Thomas E.  
2                   Johnston, Chief Judge, United States District Court,  
3                   Southern District of West Virginia, in Charleston, West  
4                   Virginia, on January 9, 2023, at 9:30 a.m., as follows:

5                   THE COURT: Good morning. This is Judge Johnston.  
6                   This is a telephonic status conference in Jonathan R. v.  
7                   Justice, civil action number 3:19-cv-00710.

8                   I have on the line my law clerk, Adam Wilson; my  
9                   courtroom deputy, Staci Wilson; and my court reporter, Ayme  
10                  Cochran.

11                  We are on the record.

12                  Will counsel please note their appearances?

13                  MR. WALTERS: Richard Walters and Alex Meade for  
14                  Shaffer & Shaffer on behalf of the plaintiffs.

15                  MS. WALLER: Lori Waller, Disability Rights of  
16                  West Virginia, on behalf of plaintiffs.

17                  MS. TEBOR: Julia Tebor, A Better Childhood, on  
18                  behalf of the plaintiffs.

19                  MR. PEISCH: Phillip Peisch and Julia Siegenberg  
20                  at Brown & Peisch for the defendants.

21                  MR. COMPTON: Steven Compton, Deputy Attorney  
22                  General, for the defendants.

23                  (Cross-talk)

24                  MS. BROWN: Sorry. Caroline Brown, Brown &  
25                  Peisch, for the defendants.

1 THE COURT: Wow. That's a small crowd for one of  
2 these calls.

3 Well, I appreciate you all joining me. I will ask that  
4 when you're not speaking that you mute your phone and that  
5 when you are speaking you identify yourself for the benefit  
6 of myself and the court reporter.

7 To use a trite in opening, I suppose you all are  
8 wondering why I've called you here today, and I will tell  
9 you the reason.

10 First of all, a -- in case you're wondering, and I'm  
11 sure you are, an opinion on the motion to dismiss is  
12 imminent. It's not ready to go. It probably won't come out  
13 today, but it is imminent and, suffice it to say, as the old  
14 saying goes, you're going to win some and you're going to  
15 lose some. So -- and I'm not going to get any more specific  
16 than that. So, that isn't really why I called the telephone  
17 conference, but I wanted to address that at the outset.

18                   The reason I really tried to -- or I really set up the  
19                   telephone conference is that for all of us in West Virginia  
20                   it's pretty obvious that the hottest topic of this  
21                   legislative session which is about to begin is the DHHR and  
22                   its troubles and it -- the idea occurred to me that now  
23                   might be time that -- the time that the iron is hottest to  
24                   strike and get the people who are real decision-makers in  
25                   all of this into this process and try to find a resolution

1 that's satisfactory to everybody.

2 I'm a little disappointed Ms. Lowry is not on the call  
3 today because she seems to be calling the shots for the  
4 plaintiffs, for the most part.

5 MR. WALTERS: Your Honor, if I may, Ms. Lowry  
6 contacted me on Friday. She unfortunately has COVID and  
7 asked me to take lead in the hearing this morning and that's  
8 why she's not available.

9 COURT REPORTER: I'm sorry. Who was that  
10 speaking, please?

11 THE COURT: I'm sorry --

12 MR. WALTERS: I forgot to identify myself. This  
13 is Rich Walters of Shaffer & Shaffer.

14 THE COURT: Okay. Well, I suppose, Mr. Walters,  
15 in some ways it's good because, you know, the news of the  
16 issues with DHHR probably haven't -- isn't quite as readily  
17 available in New York City as it is here in Southern West  
18 Virginia. I'm sure you're aware of it.

19 And I think that the -- there is a greater and greater  
20 awareness within the legislature, within the media, and  
21 within the public that there are serious problems with DHHR  
22 and the legislature appears poised to focus very much on  
23 DHHR and its issues in this session.

24 That strikes me as a great opportunity to find a real  
25 resolution to this case. And so, this is what I propose

1 that we do.

2 I propose that you all give me the authority to reach  
3 out and it would probably be first to Speaker Hanshaw and  
4 get the legislators who are the leaders on this issue  
5 involved in this process so that we can find a resolution to  
6 this case.

7 And my suggestion is that, you know, the Speaker and  
8 the Senate President are going to be involved in everything,  
9 but they're also -- so, they'll be involved in this, but  
10 they're also involved in everything.

11 I also think that, based on my days in politics, which  
12 have long since passed, that not a lot gets done the first  
13 few weeks of the legislature and a lot gets done in the last  
14 few weeks and they get very busy. So, the beginning of the  
15 session, or right before the beginning of the session, may  
16 be the very best time for us to put this case on their radar  
17 and say, look, we need to find a solution to the issues  
18 being raised in this case.

19 So, and I -- I would propose that we try to bring  
20 everybody that has any authority on this to resolve the  
21 issues in this case, get them into a room, and figure it  
22 out. I know we tried this once before with Mr. Crouch  
23 representing DHHR in those negotiations. I was pretty  
24 underwhelmed with that whole process. He's now gone. The  
25 agency has new temporary leadership and I presume will be

1       getting new permanent leadership soon but, in the meantime,  
2       it's under a microscope and what is being seen under that  
3       microscope isn't pretty. So, I suggest that now is the time  
4       to get all of those folks involved and try to find an  
5       appropriate resolution to this case.

6           And, again, my proposal is that you give me the  
7       authority to reach out to individual legislators to -- to  
8       get them to agree to participate in a settlement negotiation  
9       on this case starting with Speaker Hanshaw.

10          I will hear from the plaintiffs first about their  
11       thoughts on this.

12           MR. WALTERS: Your Honor, you may recall, we kind  
13       of crossed this bridge a little bit a few years ago when the  
14       case got off and we were hesitant at that time to get the  
15       legislature involved mainly -- I mean, yes, there are a lot  
16       of things the legislature needs to do and, hopefully, they  
17       will go down the right path, but I'm not sure that they have  
18       the control or are in the position to do some of the things  
19       that you can do to get DHHR to comply with the current rules  
20       and regs.

21          So, from the get-go, our position has never been that  
22       we need to go in and change anything. We just need to get  
23       them to comply with what's already in place. And that's  
24       what they have done, failed to do, and that's what's being  
25       -- the light is being shown on now.

1                   So, I don't want to say no. I'm hesitant. Anything to  
2 get the matter resolved, of course, we are always in favor  
3 of, but what I would like to do and what I would ask the  
4 Court's indulgence on is for us to get together and talk  
5 about this and report back in a day or two and give you our  
6 thoughts on it. As you might expect, this is not what I was  
7 expecting from the status call today. And so, I've kind of  
8 got -- I'm torn on it, Your Honor. I like the idea of  
9 getting it resolved, of getting these issues fixed because  
10 they need to be fixed, and that's for all the reasons we've  
11 seen throughout the press, as well as what we've discovered  
12 in discovery, and just from general knowledge, but if I  
13 could just have a short pause to consult Ms. Lowry and the  
14 other members of our team and discuss it.

15                   THE COURT: Well, as you discuss it, I want to  
16 suggest just a couple of thoughts for you. One is that I  
17 know you want me to appoint a monitor and essentially take  
18 over the oversight, if not the running of the foster care  
19 program in West Virginia. That doesn't mean you're going to  
20 get it. And we probably have years of litigation ahead of  
21 us, not the least of which will probably be you all or the  
22 other side running off to the Fourth Circuit to complain  
23 about my rulings again. So, that's going to take a long  
24 time.

25                   I'm offering you a potential opportunity to do some

1 good for these kids in the very near term.

2 MR. WALTERS: I -- right. I understand that and  
3 that's why -- that's why, Your Honor, and I do appreciate  
4 the fact that the legislature, this is their hot topic. And  
5 so, I absolutely understand where you're coming from and I  
6 think there's obviously a lot of merit to it.

7 I would just like to -- and will certainly convey that  
8 to Ms. Lowry and discuss it. And then we'll certainly take  
9 your -- yes, we'll certainly take that into consideration.

10 THE COURT: All right. Well, I want to hear back  
11 by Wednesday and, if Ms. Lowry's answer is no, then I'm  
12 going to want to talk to Ms. Lowry. And you can tell her  
13 that.

14 MR. WALTERS: Understood, Your Honor. Yes, sir.

15 THE COURT: All right. Mr. Peisch?

16 MR. PEISCH: Your Honor, Phil Peisch for the  
17 defendants. Just as -- just as was the case a few years  
18 ago, we do not have any opposition to engaging the  
19 legislature on this. DHHR views its legislative partners as  
20 critical to any and all improvements in reform in the child  
21 welfare system, and works closely with them, and would be  
22 happy to sit down with them and have the Court engage them  
23 as part of this process.

24 I would -- you know, I don't think this is the proper  
25 forum or the time to litigate these issues, but I would be

1 remiss if I didn't mention that, although there is a lot of  
2 press attention and criticism of DHHR, that is true, and it  
3 is certainly not -- you know, there are a lot of  
4 improvements to be made. DHHR -- and the record in this  
5 case shows that DHHR has worked very closely with the  
6 legislature over the last five years to improve the system.  
7 And great improvements have been made. And I would just  
8 urge the parties to wait for the -- and the Court to wait  
9 for the actual record on that because I think the press  
10 coverage has not been entirely complete on the situation  
11 with child welfare in West Virginia.

12 THE COURT: Well, I appreciate your willingness to  
13 indulge my suggestion. And I would point out to you, you  
14 know, sort of the other side of the coin, and that is that  
15 in spite of the claims of improvement, I think it's pretty  
16 well known throughout the state that the foster care system  
17 does not work like it should.

18 And I'll give you an example of that. The church that  
19 I attend makes foster care one of its primary ministries and  
20 encourages people to be foster parents because of the  
21 difficulty in finding good foster parents. The pastor  
22 himself has had a number of foster kids in the last couple  
23 of -- couple, three years, and they've now started a new  
24 ministry for those who -- who don't have foster children to  
25 do other things to support those who do have foster

1       children. And, no doubt, part of the reason for that is  
2       that the system is perceived to be a mess.

3           So, you know, there's a lot of reasons, I think, for  
4       both sides to take me up on my suggestion that we find a  
5       solution to this. And the ultimate reason is for the  
6       benefit of -- regardless of the legal outcomes, of all the  
7       legal issues that may be litigated in this case both here  
8       and at the appellate court, and the merits of those issues  
9       which, you know, you're about to get an opinion on, in any  
10      event, this is about these foster kids.

11           And I -- I initially didn't think this was the  
12       appropriate forum. The Fourth Circuit felt otherwise. And  
13       so, I look at this case, and I look at the current situation  
14       in the state, and in the legislature, and I say if there was  
15       ever a time to try to find a solution to this case through a  
16       settlement, now is the time.

17           MR. PEISCH: Your Honor, this is Phil Peisch for  
18       the defendants. Thank you for that. And I -- I do want to  
19       make clear, and this has been our position from the very  
20       beginning of the case, DHHR is all ears in terms of  
21       proposals that can improve the system and make it better.  
22       So, convening the parties, and the critical parties like  
23       you've suggested to help advance that process is something  
24       we -- we certainly support and will engage in fully and work  
25       hard to advance.

4 MR. PEISCH: Yes, Your Honor, you do.

5 THE COURT: Very well.

6                   And I will await to hear from the plaintiffs here in  
7 the next couple of days.

11 THE COURT: All right. That sounds good.

12 Anything else we can take up today?

13                   The motions are under advisement but, like I say, an  
14                   opinion on the motion to dismiss is imminent. And I don't  
15                   usually give any previews of opinions, but this one, I think  
16                   it would be hardly a surprise to anybody in this case to say  
17                   you're going to win some and you're going to lose some. And  
18                   you might say, well, are you saying that to me, Judge? And  
19                   the answer is yes.

20 So, that's -- is there anything else other than that we  
21 need to take up in this case today?

22 MR. WALTERS: No, Your Honor. Not for the  
23 plaintiffs.

24 MR. PEISCH: No, Your Honor. Not from the  
25 defendants.

1 THE COURT: All right. Have a good day.

2 MR. WALTERS: Thank you, Your Honor.

3 MR. PEISCH: Thank you.

4 (Proceedings concluded at 9:50 a.m., January 9, 2023.)

5

6

7 CERTIFICATION:

8 I, Ayme A. Cochran, Official Court Reporter, certify  
9 that the foregoing is a correct transcript from the record  
10 of proceedings in the matter of Jonathan R., et al.,  
11 Plaintiffs v. Jim Justice, et al., Defendants, Civil Action  
12 No. 3:19-cv-00710, as reported on January 9, 2023.

13

14 s/Ayme A. Cochran, RMR, CRR

January 9, 2023

15 Ayme A. Cochran, RMR, CRR

DATE

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